United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: July 22, 1997

CASE NO. 95 INA 488

In the Matter of:

SALISBURY STATE UNIVERSITY,
Employer

on behalf of

AGATA LISZKOWSKA,
Alien

Appearance: M. E. K. Mpras, Esq., Annandale, Virginia

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Agata Litszkowska (Alien) by Salisbury University (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On December 20, 1993, Employer applied for alien employment certification on behalf of the Alien to fill the position of Foreign Student Advisor. The application stated that the Employer's minimum requirements for the position were a Bachelor of Science degree in English and two years experience in the job offered or two years experience as a Program Director. The Other Special Requirements listed were "good references; computer knowledge with Lotus 123; WP 5.1, DBASE and Mcintosh; good communication skills and willing to work over time as required". AF 207-208. Although the resumes of nine U. S. applicants were received and referred to the Employer following its recruitment advertisement, the Employer rejected all applicants referred. AF 194-195.[2]

Notice of Findings. On February 7, 1995, the Certifying Officer (CO) issued a Notice of Findings (NOF) to advise the Employer that, subject to rebuttal, labor certification would be denied based upon the CO's finding that Employer's requirements for the position were unduly restrictive. The reason for denial was that Employer failed to submit evidence to show that a degree majoring in English is the only undergraduate degree that was related to the duties and responsibilities indicated on the ETA 750A form. A further reason for denial of certification was that no evidence was submitted to show any relationship between the offered position and that of Program Director that the Employer listed under "related occupation", other than that it is directly related to the Alien's prior work history. Employer was directed to rebut this finding by either demonstrating the of these job requirements or by eliminating the requirements and readvertising

[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

the position. The NOF advised Employer further that its wage offer was below the prevailing wage, and the Employer was given the opportunity to correct this defect, as well. AF 171-174.

Rebuttal. In its rebuttal, the Employer amended the application by removing the experience and degree in English requirements. At the same time, however, the Employer added new and further requirements of a Masters Degree, computer knowledge with VAX-SIS and familiarity with immigration regulations relating to foreign students. Employer amended the application to offer the prevailing wage in its rebuttal. AF 40-41.

Final Determination. On June 1, 1995, the CO issued a Final Determination in which labor certification was denied on grounds that the rebuttal was not responsive to the defects cited in the NOF and the CO concluded for this reason that the Employer had failed to cure the violation. The CO said that although the Employer had removed the objectionable requirements, it amended the application by adding new onerous requirements that were beyond any option that the NOF provided. Employer's rebuttal was accepted as curing the prevailing wage violation, however. AF 05-07.

Appeal. The Employer requested administrative-judicial review of the denial in its letter of June 22, 1995. AF 01-04.

Discussion

The Employer is required by 20 CFR § 656.21(b)(2) to prove that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States and as defined for the job in the Dictionary of Occupational Titles (DOT).

In items 14 and 15 on the ETA 750A the employer is required to notify the CO of its minimum requirements so that the CO may, if necessary, challenge the stated requirements as unduly restrictive or as greater than the actual minimum qualifications for the jobs for the purpose of protecting U.S. applicants who may be discouraged from applying for the job by advertised requirements which are unduly restrictive or are not the actual minimum skills needed to perform its duties. **Bell Communications Research, Inc.**, 88 INA 026(Dec. 22, 1986). It is well established that during rebuttal an employer may correct a job opportunity that has been described with unduly restrictive requirements by deleting such offensive specifications or by reevaluating job candidates without considering those requirements. **Standard Oil Company,** 88 INA 77(Sept. 14, 1988); **H.C. LaMarche Ent., Inc.,** 87 INA 607 (Oct. 27, 1988).

In this case, the CO objected to the Employer's original job requirements in part because they appeared to be tailored to the Alien's qualifications. While the Employer complied by deleting the objectionably restrictive English baccalaureate degree requirement and alternative experience requirement as a Program Director, the Employer then added a Master's degree requirement and deleted the experience requirement altogether. In so doing, Employer's requirements became more restrictive and now appear, as the CO noted, to be a basis for disqualifying otherwise qualified U.S. workers. The Employer's requirements explicitly mirror the qualifications of the Alien, whose application indicates that she holds a Masters degree but has no experience in the job offered.

For these reasons we conclude, as did the CO, that Employer has failed to present its actual minimum requirements for the position. On the other hand, however, labor certification was not properly denied by the CO, because a supplementary NOF should have been issued to give the Employer the opportunity to strike from its application and job description the offensive additions it had made in its first rebuttal. Because we cannot find that the Employer's application for certification was properly denied, we must enter the order that follows.

ORDER

This application for certification is ordered remanded to the Certifying Officer for readvertisement and for such further and additional proceedings as the Certifying Officer shall deem appropriate.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO. 95 INA 488

SALISBURY STATE UNIVERSITY, Employer
AGATA LISZKOWSKA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: July 3, 1997